

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73412

**FILED**

AUG 14 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Brendan James Nasby appeals from an order of the district court denying a petition for a writ of habeas corpus filed on January 26, 2016.<sup>1</sup> Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

In his petition below, Nasby sought the district court's opinion as to questions of law that pertained to the validity of his judgment of conviction. Nasby was adamant he was seeking relief pursuant to the habeas corpus provisions of NRS 34.360 through NRS 34.680 and not through the postconviction habeas corpus provisions of NRS 34.720 through NRS 34.830, as he specifically was not "[r]equest[ing] relief from [his] judgment of conviction or sentence." NRS 34.720(1) (setting out the scope of postconviction habeas petitions).

A person "may prosecute a writ of habeas corpus to inquire into the cause of [his] imprisonment or restraint." NRS 34.360. The cause of Nasby's imprisonment, as reflected in his petition and the record before this

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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

court, is a December 2, 1999, judgment of conviction for conspiracy to commit murder and first-degree murder with the use of a deadly weapon, the latter of which carried a life sentence. Nasby's request for an advisory opinion on questions that would reach the validity of that judgment was outside the scope of claims available in a habeas petition filed pursuant to NRS 34.360 through NRS 34.680.

Nasby argued his claims are within the scope of a habeas petition because they "cannot otherwise be reviewed, or . . . are so important as to render ordinary procedure inadequate and justify the extraordinary remedy." *State ex rel. Orsborn v. Fogliani*, 82 Nev. 300, 303, 417 P.2d 148, 149 (1966). Nasby's claims were reviewable on an appeal from his judgment of conviction, and he failed to demonstrate his claims were so important as to render an appeal inadequate or to otherwise justify an extraordinary remedy. And even if Nasby's claims fell within the scope of a habeas petition, he was not entitled to relief as Nevada courts do not issue advisory opinions. *See Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010).

Nasby argues the district court erred by construing his pleading as a postconviction petition for a writ of habeas corpus and then denying it as procedurally barred. However, the district court also correctly held that advisory opinions such as Nasby sought are improper. Accordingly, even if the district court misconstrued the pleading, Nasby is not entitled to relief.<sup>2</sup>

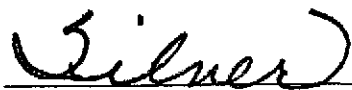
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<sup>2</sup>Contrary to Nasby's contention, the district court's order did not overturn an order by the Eleventh Judicial District Court. The Eleventh Judicial District Court did not "hold" that Nasby's petition was not a postconviction habeas petition; it merely identified Nasby's petition by copying how he himself had styled it.


Nasby also asks this court to determine whether he made a showing of actual innocence. Nasby did not raise this question below, and we thus need not consider it on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999). Moreover, we note that the Nevada Supreme Court has never held a freestanding claim of actual innocence exists. *See Berry v. State*, 131 Nev. 957, 967 n.3, 363 P.3d 1148, 1154 n.3 (2015). The alternative, a gateway claim of actual innocence, is merely a means by which a petitioner may obtain a decision on the merits of an otherwise procedurally barred postconviction habeas petition, *see id.* at 966-67, 363 P.3d at 1154, a remedy that Nasby has expressly repudiated.

Finally, Nasby complains that the district court failed to address his motion to appoint counsel and his motion to extend prison copy work limits. The district court implicitly denied both motions when it denied Nasby's petition, and we conclude the district court did not abuse its discretion in doing so. For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. William D. Kephart, District Judge  
Brendan James Nasby  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk